



**Ethics and Anticorruption Commission v Lobo & another (Sued as the Legal Representatives/ Administrators the Estate of the Late Paul Lobo) & 2 others (Environment & Land Case 175 of 2009) [2023] KEELC 17180 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17180 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 175 OF 2009**

**LL NAIKUNI, J  
APRIL 27, 2023**

**BETWEEN**

**ETHICS AND ANTICORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**SARAH MARIA LOBO & MYRTLE DESA (SUED AS THE LEGAL REPRESENTATIVES/ ADMINISTRATORS THE ESTATE OF THE LATE PAUL LOBO) ..... 1<sup>ST</sup> DEFENDANT**

**BERNARD ATATI ..... 2<sup>ND</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. The ruling before this Honorable Court pertains to a Notice of Motion application dated 15<sup>th</sup> July 2022 moved by Mr. Bernard Atati, the 2<sup>nd</sup> Defendant/Applicant herein. The application was instituted under the provisions of the Sections 3A, 63(e) and 100 of the *Civil Procedure Act*, Cap. 21; Order 8 Rule 3 and Rule 5; Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and any other relevant enabling provisions of the Laws of Kenya.

**II. The 2<sup>nd</sup> Defendant/Applicant's case.**

2. The 2<sup>nd</sup> Defendant/Applicant herein sought for the following orders:-
  - a. Spend.
  - b. That the Honorable Court be pleased to grant the Applicant leave to amend his Defence in line with the Draft annexed on the supporting affidavit filed herewith.



- c. That this Honourable Court be pleased to admit the Applicant's witness statement and List of documents lodged herein out of time.
  - d. That costs of this application be in the cause.
3. The said application is based on the grounds, testimonial facts and the averments made out under the 14 Paragraphed Supporting Affidavit of Bernard Atati, the 2<sup>nd</sup> Defendant/Applicant, sworn and filed on 15<sup>th</sup> July 2022 together with one ( 1 ) annexures marked as "BA – 1" attached thereof.
  4. The Deponent stated that the matters deponed to were within his knowledge or were derived from advise as tendered by his Advocate on record in this matter and were true to best of his knowledge and belief.
  5. In the said supporting affidavit, the deponent averred that when he was served with the summons to enter appearance, he instructed his then advocates M /s Kipkenda, Lilan & Koech to enter appearance and file a defence on 17<sup>th</sup> July 2009. He added that he supplied all the documents he was to rely on to his aforesaid advocates and in addition recorded and signed a witness statement with them, in the belief that they would lodge all the documents in court in accordance with the rules.
  6. He further deposed that he changed advocates and appointed the Law firm of Messrs. Magut and Sang Associates who had all along been calling to be furnished with the original file held by his previous advocates and was only able to obtain the same three days before this current application was filed. He further stated that his current advocates requested him to travel to Eldoret for pre-trial conference after the file was retrieved, and in the process of going through the file, it was discovered that the previous advocates had neither filed the witness statement nor the list of documents to be relied upon.
  7. The 2<sup>nd</sup> Defendant/Applicant asserted that he had similarly instructed his previous Advocate to lodge a Counter - Claim to the suit filed by the Plaintiff herein, which had also not been done. He added that he stood to be greatly prejudiced if the matter proceeded to hearing as he was the one actually residing in the premises by virtue of being a bonafide purchaser from the deceased Defendant and he has a good defence as shown by his annexed copy marked as "BA – 1".
  8. The Deponent further informed Court that it was in the interest of justice that he was granted leave to amend and to include the intended counterclaim, but also to lodge his witness statements and documents out of time. He added that the unfortunate delay was caused by the mistake of his previous advocate and is not of his own making. He concluded by stating that no prejudice shall be visited upon the other parties if his application was allowed and further that he was ready and willing to abide by any conditions set by this Honorable Court.

### **III. The Responses by the Plaintiff/Respondent**

9. In response to the 2<sup>nd</sup> Defendant/Applicant's application, on 10<sup>th</sup> November, 2022, the Plaintiff/ Respondent filed a five ( 5 ) grounds of Opposition dated 8<sup>th</sup> November, 2022 as stated here below. These were:-
  - a. The Application herein is frivolous, misconceived, fatally defective and an abuse of the Court process.
  - b. The Application herein contravenes the provisions of Articles 47 and 50(e) of the Constitution of Kenya 2010, Order 8 Rule3 and 5 of the Civil Procedure Code.
  - c. The Application herein has been brought after 14 years and without any reasonable grounds.



- d. The Application herein has been brought to obstruct the fair Administration of Justice and prevent this matter from proceeding to its conclusion in the public interest.
- e. The Application herein if allowed would prejudice the Plaintiff in that he would be able to authenticate the contents on the evidence particularly the documents that the 2<sup>nd</sup> Defendant/Applicant intends to use in court.
10. Additionally, on 10<sup>th</sup> November 2022, the Plaintiff/Respondent herein filed an 18 Paragraphed Replying Affidavit sworn on 8<sup>th</sup> November 2022 by the Plaintiff/Respondent's deponent Dedan Okwama. He deponed that he is an investigator with the Plaintiff/Respondent duly appointed under section 23 and 24 of the *Anti-Corruption and Economic Crimes Act*.
11. He averred that the application is frivolous, misconceived, utterly defective and an abuse of the due process of this court as it is brought without any reasonable grounds with a view to obstruct the fair administration of justice. He added that the 2<sup>nd</sup> Defendant/Applicant inordinately delayed in making his application for over 14 years and justifiable reason was provided.
12. He averred that the 2<sup>nd</sup> Defendant/Applicant filed a joint defence together with the 1<sup>st</sup> Defendant dated 16<sup>th</sup> July 2009 through the firm of Kipkenda Lilian and Koech Advocates and the said Advocates and the 2<sup>nd</sup> Defendant/Applicant had appeared severally in court ready to proceed with the matter.
13. He deponed that further to the foregoing, the 2<sup>nd</sup> Defendant/Applicant appointed the firm of Mogut & Company Advocates on 14<sup>th</sup> September 2018 and in barely one month the 2<sup>nd</sup> Defendant/Applicant, through his Counsel moved this Court by way of Notice of Motion Application dated 17<sup>th</sup> October 2018, seeking orders that this suit abated against the 1<sup>st</sup> Defendant and could therefore not stand against him.
14. He averred that subsequently the Plaintiff/ Respondent herein filed an Application for the 1<sup>st</sup> Defendant legal representative of his estate be enjoined in this suit as the suit had not abated against him. Both applications were heard concurrently and a ruling was delivered on 18<sup>th</sup> March 2019 dismissing the 2<sup>nd</sup> Defendant's Application seeking abatement and granting leave to Plaintiff to amend its pleadings and substitute the 1<sup>st</sup> Defendant with the Legal Representative of his estate.
15. He further averred that the Plaintiff/Respondent amended its Complaint on 24<sup>th</sup> April 2019, and served the 2<sup>nd</sup> Defendant/Applicant but the said Defendant failed to file its amended Defence in good time. He added that his case was mentioned before this court on diverse dates being the 13/5/2019, 24/7/2019 and 15/7/2022 for purposes of according the Defendants and particularly the 2<sup>nd</sup> Defendant/Applicant an opportunity to amend his Defence but the said Defendant has never made efforts to comply with the orders of this Honourable Court and or never informed this Honourable Court of any challenges that he was facing from his Advocates.
16. He further deponed that Court records can confirm that on several occasions the 2<sup>nd</sup> Defendant Counsel was indulged by this Court to file their Defence and the 2<sup>nd</sup> Defendant, through his Counsel Magut Sang' & Company Advocate filed his Witness statement on 17<sup>th</sup> September 2019. He added that on various dates, 4<sup>th</sup> July 2018, 9<sup>th</sup> December 2020, 9<sup>th</sup> and 10<sup>th</sup> March 2022, 18<sup>th</sup> and 19<sup>th</sup> July 2022 this matter came for hearing and the Plaintiff/Respondent was always ready to proceed, but the 2<sup>nd</sup> Defendant/Applicant and his Counsels on all the occasions sought adjournments based on flimsy grounds hence delaying this matter from proceedings.
17. He averred that four years (4) have lapsed since the 2<sup>nd</sup> Defendant/Applicant's Advocate was appointed and neither the 2<sup>nd</sup> Defendant/Applicant nor his Advocates had moved the court, made efforts



to amend their pleadings and/or comply with the orders of amending their Pleadings when the court accorded them the opportunity during the Pre - trial. He added that the current application contravened the provisions of Order 8 Rule 3 and 5 of the Civil Procedure Rules which allowed filling of Defence within 14 days of service.

18. In conclusion, the deponent averred that the 2<sup>nd</sup> Defendant/Applicant's application, brought after 14 years and 4 years after appointing his current advocates is an abuse of the court process and the same should not be entertained by this court as it would occasion great prejudice to the Plaintiff/Respondent.
19. When then matter came up in court on 16<sup>th</sup> November 2022, parties were granted leave to file further replies and submissions on the 2<sup>nd</sup> Defendant/Applicant's application.

#### **IV. Submissions\***

20. On 16<sup>th</sup> November, 2022, while all the parties were present in Court, directions were made by consensus that the Notice of Motion application dated 15<sup>th</sup> July, 2022 herein be canvassed by way of written submissions herein. Pursuant to that, its only the Plaintiff/Respondent who complied and thus the Court reserved to deliver the Ruling on notice accordingly.

#### **A. The Written Submissions by the 2nd Defendant/Applicant.**

21. On 27<sup>th</sup> January, 2023 the Learned Counsel for the 2<sup>nd</sup> Defendant/Applicant, the Law firm of Messrs. T. K Rutto & Company Advocates filed their written Submissions in support of the filed Notice of Motion application dated 15<sup>th</sup> July, 2022. Mr. T. K Rutto Advocate commenced his submissions by making a brief introduction of the matter before this Court and the issues pertaining to the filed application. The Learned Court averred that there was only a single issue for the determination by this Honorable Court and that was whether the application was justifiable for the amendment of the 2<sup>nd</sup> Defendant's Defence and Counter Claim.
22. To support his submission, the Learned Counsel underscored on the underlying principles that governed the amendment of pleadings and cited several decisions of Court on the same issue. These included "the Civil case No. 7 of 2017, *St Patrick's Hills School Limited v Bank of Africa Kenya Limited*" eKLR, [2018] and "*Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR." Where the Court stated:-

"The Law on amendment of pleadings in terms of Section 100 of the *Civil Procedure Act* and Order VIA Rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this Court, quoting from *Bullen and Leake & Jacob's Precedents of Pleading* – 12<sup>th</sup> Edition, in the case of *Joseph Ochieng & 2 Others v First National bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:-

The ratio that emerge out of what was quoted from the said book is that powers of the Court to allow amendments is to determine the true, substantive merits of the case; amendments should be timeously applied for; powers to amend can be exercised by the Court at any stage of the proceedings (including appeal stage); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side....."

23. Based on these principles, the Learned Counsel argued that the application by the 2<sup>nd</sup> Defendant/Applicant was justifiable. He asserted that the matter was still at the hearing stage and the pleadings had not been closed hence the application was brought timeously and meritoriously. To him the



amendment would not be introducing any new Cause of action which was substantially different from the already existing one offending the provision of Order 8 Rules 3 ( 5 ) of the Civil Procedure Rules, 2010. According to the Learned Counsel, it was the contention of the Learned Counsel that the proposed amendment of the Defence and Counter Claim would not cause any injury or injustice to the other parties which could not be compensated by costs. It was not a device to abuse the Court process and its necessary for the purposes of determining the real question in controversy between the parties and avoid multiplicity of suits.

24. He averred that the delay in bringing the amendment for the Defence and to include a Counter Claim was not deliberate but were beyond the control of Plaintiff as it was the mistake of the initial Advocate on record and which in law ought not be visited on the innocent litigant. The litigant should never be made to suffer. He contended that the amendment was done in good faith and in the interest of Justice and urged Court to allow the application as prayed.

### **B. The Written Submissions by the Plaintiff/Respondent**

25. On 16<sup>th</sup> November 2022, the Learned Counsel for the Plaintiff/Respondent, the Ethics & Anti-Corruption Commission filed its written submissions, dated 14<sup>th</sup> November 2022. M/s. Fatuma Abdurahim S Advocate commenced her submission by providing a brief introduction and factual background of this matter. She proceed to outline the following issues for determination: -
- a. Whether the application herein is frivolous and an abuse of the due process of this court?
  - b. Whether the Application herein is merited and this Honourable Court should grant the same?
26. On the 1<sup>st</sup> issue, the Learned Counsel submitted that the 2<sup>nd</sup> Defendant/Applicant's application was frivolous, misconceived, utterly defective and an abuse of the court since it has been brought 14 years after the 2<sup>nd</sup> Defendant filed his Defence on 16<sup>th</sup> July 2009 through his 1<sup>st</sup> Advocate and (four) 4 years after appointment of his current advocates Magut Sang & Company Advocates and no reasonable substantive grounds have been given for the inordinate delay.
27. The Learned Counsel further submitted that the 2<sup>nd</sup> Defendant/Applicant appointed his current advocates on 14<sup>th</sup> September 2018 but instead of complying with pretrial procedures, he moved the court through his Notice of Motion dated 17<sup>th</sup> October 2018 seeking orders that this suit has abated against the 1<sup>st</sup> Defendant and should therefore not stand against him, which application was dismissed on the 18<sup>th</sup> March 2019, allowing this matter to proceed for hearing.
28. The Learned Counsel submitted that the Plaintiff/Respondent amended its Complaint on 24<sup>th</sup> April 2019 and served the 2<sup>nd</sup> Defendant/Applicant with the same on 13<sup>th</sup> May 2019 and on 17<sup>th</sup> September 2018, the 2<sup>nd</sup> Defendant/Applicant filed his statement in support of his case. He added that pursuant to further orders of the court, the 2<sup>nd</sup> Defendant/Applicant was required to file his defence within 14 days as per Order 7 Rule (1) together with other pretrial documents as per Order 7 Rule 5. Counsel also referred to Order 8 Rule 3(1) on the powers of the court to allow any party to a suit leave to amend its pleadings at any stage of the proceedings.
29. The Learned Counsel submitted that the 2<sup>nd</sup> Defendant/Applicant failed to comply with the Civil Procedure Rules and orders of this Honourable Court during the for Pre-trial Conferences on 11<sup>th</sup> May 2019, 24<sup>th</sup> July 2019, 15<sup>th</sup> July 2020 and when he sought similar leave to file Amended Defence and was granted.



30. The Learned Counsel further argued that the 2<sup>nd</sup> Defendant/Applicant failure to amend his defence when granted leave and a further number of opportunities granted by this court violated the overriding objectives that promote just, expeditious and efficient disposal of matters in the court.
31. The contention by the Learned Counsel was that on diverse dates of 4<sup>th</sup> July 2018, 9<sup>th</sup>, 10<sup>th</sup> March 2022, 18<sup>th</sup> and 19<sup>th</sup> July 2022 respectively this matter came up for hearing and the 2<sup>nd</sup> Defendant/Applicant and his Counsel adjourned the matter on flimsy grounds and at no time did they inform the court of their intention to amend pleadings until at the time of hearing. He added that this shows that this current application by the 2<sup>nd</sup> Defendant/Applicant is an afterthought and its intention is to frustrate the case from proceeding.
32. The Learned Counsel opined that the current application was brought after 4 years of appointment of the 2<sup>nd</sup> Defendant's counsel after failure to comply. To buttress on this point, she relied on the cases of "HCCC No.340 of 2011, *Gulf bank Limited v Bactlab Limited & 4 others* [2017] eKLR, where Tuiyott J declined an application for amendment of, Defence and Counterclaim filed after three years, for the reason that there was inordinate delay in filing the same and that delay could lead to an injustice on the other side; "HCC No. 853 of 1999, *Julius Kabui Mwangi & Ano v Wangui Gatundu & 12 others* [2015] eKLR where Onyancha J, held that "the court cannot therefore favorably exercise its discretion in that matter, where an application for amendment is filed after 11 years"; HCC No. 796 of 2009. *Ngaga Enterprise Limited v Peter Pande* [2016] eKLR where Ogola J. opined that:-
- “the proposed amendments, being filed after six years after Defence was filed, if allowed will be highly prejudicial and unjust to the Plaintiff as the original suit and the Defence would be entirely lost to the detriment of the Plaintiff.”
33. On the 2<sup>nd</sup> issue, the Learned Counsel contended that the Application was frivolous, vexatious, misconceived and fatally defective as the draft Amended Defence and Counterclaim upon which the 2<sup>nd</sup> Defendant/Applicant intended to file was a sham as it never raised any reasonable cause of action against the Plaintiff/Respondent. That the Plaintiff/Respondent was never privy to the said illegal transaction to warrant it to be added as the Defendant in the Counter Claim. To buttress her argument she cited the case of "*Kigwe Limited v Njewar Academy* [2014] eKLR, where the Court denied the orders sought and struck out a Defence and Counter Claim by opining that:-
- “There can be no justification to drag a party through a full trial when it is plain and clear that there is no case for him to answer at the trial, In the present case I find that the Plaintiff has no case to answer not having been privy to the agreement the Defendant relies on to found his Counter Claim and there definitely can no basis to require that the matter proceeds to full trial.
34. Therefore, she held that the Counter Claim against the Plaintiff did not raise any reasonable cause against the Plaintiff and could not stand to warrant this Court to allow the application. Hence, in conclusion, the Learned Counsel urged the Honorable Court to find that the 2<sup>nd</sup> Defendant/Applicant's application was unmerited and to dismiss the same with costs to the Plaintiff/Respondent.

#### IV. Analysis and Determination

35. Having keenly read the pleadings, submissions, the appropriate and applicable provisions of the Law. The Honorable Court has framed the following two (2) issues for determination: -



- a. Whether the Notice of Motion application dated 15<sup>th</sup> July, 2022 by the 2<sup>nd</sup> Defendant/Applicant herein meets the threshold for being granted the leave of Court to amend its Defence and Counterclaim.
- b. Who will bear the Costs of the application?

**Issue No. a). Whether the Notice of Motion application dated 15<sup>th</sup> July, 2022 by the 2<sup>nd</sup> Defendant/Applicant herein meets the threshold for being granted the leave of Court to amend its Defence and Counterclaim.**

36. Under this Sub – heading, the Honorable Court will deliberate on the concept of amendment of pleadings. The legal principles on amendment are founded under the provision of Order 8 Rules 1,2 and 3 of the Civil Procedure Rules, 2010. Rules 3 on amendment with leave provides that: -
  1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
  2. Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
  3. ....
  4. ....
  5. An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”
37. Ideally, the principles upon which a Honorable Court acts in an application to amend pleadings before/during trial are well settled and stated in several cases. For instance, Bramwell, LJ in “Tildesley v Harper” [1878], 10 Ch. D. at Page 296 stated as under:-
 

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”
38. Furthermore, from the Civil case of: “St. Patrick’s Hills School Limited (*Supra*) which the Learned Counsel for the 2<sup>nd</sup> Defendant/Applicant relied on where Courts held, “inter alia”:-
 

“The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See *Eastern Bakery v Castelino* [1958] EA 461). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see “Chitale, P.BB”). On the same subject, in the case of *Abdul Karim Khan v Mohamed Roshan* [1965] EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint. The principles upon which a court acts in



an application to amend a pleading before/during trial are also well settled and succinctly stated in *Eastern Bakery v Castelino*, [1958] EA 461 (U.) at p.462:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”

39. Additionally, in the case of “[\*Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago\*](#) [1995] eKLR the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows: -
- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b. The amendments should be timeously applied for;
  - c. Power to amend can be exercised by the court at any stage of the proceedings;
  - d. That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
  - e. The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.
40. The essential principles that this Honorable Court should consider for an application of amendment have been brought out clearly in the above-referenced precedence and the court needs to ask itself whether the 2<sup>nd</sup> Defendant/Applicant filed its application for leave to amend timeously, in good faith and if the Plaintiff/Respondent will suffer any prejudice if this application is allowed.
41. Applying the principles laid down above to the circumstances of the instant case, the 2<sup>nd</sup> Defendant/Applicant averred that he instructed his previous advocates M /s Kipkenda, Lilan & Koech to enter appearance and file a defence on 17<sup>th</sup> July 2009, having furnished them with all the necessary documents to be relied on at trial. However, he changed counsel and appointed M /s Magut and Sang Associates who have since then called on his previous advocates to furnish them with the original file and were only able to obtain the same three days before this current application was filed. In response, the Plaintiff/Respondent through their Counsel submitted that the matter has been delayed severally and the application by the 2<sup>nd</sup> Defendant/Applicant to amend his Defence and Counterclaim is an abuse of court process.
42. Perusal of the court record shows that this matter came up for Pre - trial on 5<sup>th</sup> February 2018 to confirm pretrial compliance and a hearing date of 4<sup>th</sup> July 2018 was given in court. However, the matter was adjourned to 19<sup>th</sup> September 2018. when it was adjourned a second time since the 2<sup>nd</sup> Defendant/Applicant’s Counsel stated to the court that he had just received instructions and needed to prepare as well as file further documents. When the matter came up again on 17<sup>th</sup> October 2018, Counsel for the 2<sup>nd</sup> Defendant/Applicant applied for and court granted leave to amend the Defence and Counter claim. The matter came up again on 13<sup>th</sup> May 2019 and 15<sup>th</sup> July 2020 when the court granted leave to amend the defence and also file further witness statements.
43. Additionally, on 9<sup>th</sup> March 2022, when the matter came up for hearing once more, Counsel for the 2<sup>nd</sup> Defendant/Applicant sought an adjournment stating that he was appearing in another matter and



the Plaintiff/Respondent's Counsel opposed to adjournment urging the court to take cognisance that the matter was instituted in 2009 and has been adjourned severally by the Defendants when it comes up for hearing.

44. Ordinarily a timeous application for amendment of Defence and Counterclaim should be allowed, particularly when such amendment can aid in determination of a matter on merit. However as guided by the above precedence, that application must be made timeously, without delay, in good faith and without prejudice.
45. Reasonably, the court is alive to the fact that the matter was instituted in 2009 and that all parties have been granted several opportunities to amend their pleadings and file further pretrial documents. Perusal of the record shows that the 2<sup>nd</sup> Defendant/Applicant has been given audience and leave by this court to amend pleadings. Additionally, since the 2<sup>nd</sup> Defendant/Applicants Counsel came on record on 19<sup>th</sup> September 2018, he has not put on record the challenge of receiving the original file from the previous advocate on record for the 2<sup>nd</sup> Defendant/Applicant. It is my view, and I agree with the Plaintiff/Respondent, that this application together with previous conduct of the 2<sup>nd</sup> Defendant/Applicant and his Counsel is a delay tactic which the court should not entertain any further.
46. Be that as it may, this being a land matter which we all acknowledge and take judicial notice is a source of livelihood in Kenya and thus it is emotive and sensitive, this Honourable Court perceives this as prime opportunity to invoke the inherent powers clothed under the Overriding Objectives (also known as "The Oxygen Rule" in the legal parlance). The objectives is enshrined under the provisions of Sections 3 and 13 of the Environment and Land Court, No. 19 of 2011, Sections 101 of the [Land Registration Act](#), No. 3 of 2012, Sections 150 of the [Land Act](#), No. 6 of 2012 and Articles 159 ( 1 ) and ( 2 ) of the [Constitution](#) of Kenya, 2010 which grants the Environment & Land Court jurisdiction, wide latitude and legal mandate to exercise its discretion towards achieving just, expeditious, proportionate and accessible resolution of disputes. Apart from the fact that indeed the 2<sup>nd</sup> Defendant/Applicant has exceedingly taken so long to move this Court on the amendment of his Defence and Counter – Claim, its my view taking that the matter has not yet commenced hearing, the Plaintiff/Respondent may not be directly prejudice by allowing the application. Hence, the Honourable Court will proceed to invoke the provision of Section 95 of the [Civil Procedure Act](#), Cap. 21 and Orders 50 Rules 6 and 7 on the enlargement of time. It is based on these reasoning and logic that the Honourable Court considers to allow the application by the 2<sup>nd</sup> Defendant but upon the fulfilment of certain pre - conditions.

#### **IssueNo. b). Who will bear the Costs of the application**

47. It is trite law that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or process in any litigation. The proviso of the provision of Section 27 (1) of the [Civil Procedure Act](#), Cap. 21 holds that costs follow the event. By events it means the outcome of result of the said legal action or process (See the Supreme Court case of "[Jasbir Rai Singh v Trachalon Singh](#)" eKLR [2014] and the Court of Appeal cases of [Rosemary Wambui Munene v Ihururu Dairy Co – operatives Societies Limited](#) [2014] eKLR and "[Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited](#) [2016] eKLR). Where Court directed as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”



48. The results of the motion herein is that the application by the 2<sup>nd</sup> Defendant/Applicant, though caught up on laches and prolonged delays in filing has been found to be successful in the interest of justice. Therefore, in the given circumstances, it is just fair that he bears the cost of the said application. Further, in order to balance the scale of Justice and take care of the troubles that the Plaintiff/Respondent has had to incur while preparing for the Defence and replies of this application, I order that they be paid some thrown away costs as a pre – condition to allowing the said application.

## VII. Conclusion & Disposition

49. Consequently, having caused an elaborate analysis of the framed issues herein on a preponderance of probability, the Honourable Court proceeds to make the following orders. Specifically, these are:-
- a. That the Notice of Motion Application dated 15th July, 2022 by the 2nd Defendant/Applicant herein seeking leave for the amendment of the Defence and Counterclaim be and is hereby allowed but subject to the fulfilment of the Pre Conditions stated herein below.
  - b. That the 2nd Defendant herein granted fourteen (14) days leave to formally file and serve the attached Draft Amended Defence and Counter Claim under Order 8 Rules 3 of the Civil Procedure Rules, 2010.
  - c. That thereafter, the Plaintiff herein be and is hereby granted corresponding leave of fourteen (14) days to file an Amended Plaintiff and Reply to the Amended Defence and Counter Claim pursuant to the provisions of Order 7 Rules 11 of the *Civil Procedure Rules*, 2010.
  - d. That for expediency sake, this suit should be set down for hearing and determination within the next ninety (90) days from the date of delivery of this ruling commencing being on 24th and 25th October, 2023. There be a mention on 6th June, 2023 for the final Pre – Trial Conference under the provision of Order 11 of the *Civil procedure Rules*, 2010.
  - e. That an order made for the 2nd Defendant/Respondent to pay the Plaintiff/Respondent a thrown away Costs of Kenya Shillings Fifty Thousand (Kshs. 50, 000.00) on or before the aforesaid mention date.
  - f. That failure to comply with any of the above pre – conditions and the stipulated time frame the Notice of Motion application dated 15th July, 2022, by the 2nd Defendant/Applicant shall by effluxion of time stand automatically dismissed thereof.
  - g. That this order shall apply “Mutatis Mutandis” to all the other related five (5) cases pending hearing before this Honorable Court being ELC Numbers 170 of 2009; 177 of 2009; 178 of 2009; 181 of 2009 and 270 of 2009 respectively.
  - h. That the Cost of this application is awarded to the Plaintiff/Respondent to be borne by the 2nd Defendant/Applicant.

It is Ordered Accordingly

**RULING DELIVERED THROUGH MICROSOFT TEAM SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF APRIL 2023.**

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**HON. JUSTICE L. L. NAIKUNI JUDGE**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

In the presence of:



- a. Mr. Wesonga, the Court Assistant.
- b. M/s. Abdulrahim Advocate for the Plaintiff/Respondent.
- c. Mr. Busieka Advocate for the 1<sup>st</sup> Defendant.
- d. Mr. T. K Ruto Advocate for the 1<sup>st</sup> & 3<sup>rd</sup> Defendants.
- e. Mr. T. K Ruto Advocate for the 2<sup>nd</sup> Defendants/Applicants

